MReBA Cover Notes --

A Publication of the Massachusetts Reinsurance Bar Association

Winter 2011

In This Issue

Welcome!

Third Annual Symposium A Success

The Massachusetts Reinsurance Bar Association held its third annual Symposium at the Harvard Club of Boston on October 6, 2011. The topic was "Improving Reinsurer-Cedent-Regulator Relationships." Nearly 100 insurance professionals and attorneys from across the United States attended the day-long program.

The December issue of our newsletter has traditionally provided a recap of the Symposium, and this year's edition is no exception. Steve Torres provides a thorough overview of the remarks made by our keynote speaker, Tracey Laws. Christine Phan's article offers a detailed summary of our first panel, which explored strategies that reinsurers and cedents might use to protect the attorney-client privilege with respect to materials in their files, particularly when there is a reinsurance dispute. Rachel Davison's article then analyzes the presentation given by our second panel, which focused on right-of-association and claims-control clauses in reinsurance agreements. John Matosky offers a useful summary of the workshop program that we conducted in the afternoon; and Melissa D'Alelio rounds out the issue with a summary of remarks made by the Treasury Department's David Brummond, about OFAC compliance in the insurance and reinsurance industries. Copies of the Symposium presentations and related materials will soon be available in their own section on MReBA's website.

So many people contributed to the success of this year's Symposium that I do not have space here to thank them all. The Symposium Committee, Rhonda Rittenberg, Mike O'Malley, John Harding, and Jerry McElroy all deserve special recognition. I also am deeply indebted to each of the panel chairs and to our industry presenters for all that they did. I would like to thank our sponsors, too, without whom our surroundings and amenities would have been considerably more spartan: Matson, Driscoll & Damico forensic accountants; Zelle, McDonough & Cohen LLP; and FTI Consulting.

I hope you enjoy this issue of the newsletter, and look forward to seeing you at next year's Symposium.

John N. Love
Robins, Kaplan, Miller & Ciresi, L.L.P.
2011 Symposium Chair

MReBA
Massachusetts Reinsurance Bar Association

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MReBA Calendar

MReBA Meetings:

January 11, 12:30 pm
Morrison Mahoney LLP
Focus: Educational Meeting

February 8, 12:30 pm
Prince Lobel Tye LLP
Focus: Educational Meeting

March 14, 12:30 pm
Sugarman Rogers Barshak & Cohen
Focus: Educational Meeting

General Interest:

Boston Beanpot Tournament
Boston Garden
February 13, 2012

NAIC Spring National Meeting
New Orleans
March 3-6, 2012

Red Sox Home Opener
Fenway Park
April 13, 2012

MReBA Annual Meeting & Spring Cocktail Hour
Hampshire House
April 26, 2012

ARIAS Spring Claims Conference
Palm Beach
May 9-10, 2012

RAA Current Issues Forum
Philadelphia

jnlove@rkmc.com

Symposium's Keynote Address: RAA's Tracey W. Laws - Current Regulatory Issues in the Reinsurance Marketplace

May 22-24, 2012

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By Steven J. Torres,
Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.

MReBA's 2011 Annual Reinsurance Symposium opened with an insightful keynote address by Tracey W. Laws, Senior Vice President & General Counsel at the Reinsurance Association of America ("RAA"). In her position at the RAA, Ms. Laws is responsible for establishing and advocating the RAA's public policy positions.

Drawing upon her experience at the RAA, Ms. Laws' remarks provided the audience with an overview of the current state of the reinsurance marketplace, how reinsurance is currently regulated, and emerging regulatory issues that are impacting reinsurance markets.

Today's Global Reinsurance Marketplace

Ms. Laws described reinsurance as a "global business" that provides the US with important capacity. She stated that only four of the top 25 property & casualty reinsurance groups (in 2009) were located in the United States, and that the top four reinsurance groups were located in Europe. While the U.S. is the largest property-casualty market in the world and has the largest amount of long-tail casualty business, U.S. reinsurance premium was ceded to thousands of entities in over 100 jurisdictions outside the U.S. In 2010, the total U.S. reinsurance premium ceded to non-U.S. companies was $55.1 billion, with $22.9 billion ceded to unaffiliated reinsurers and $32.2 ceded to affiliated reinsurers. Companies in 10 countries received approximately 93% of the unaffiliated premium. While U.S. reinsurers assumed over 40.1% of the reinsurance risk in the U.S., 59.9% of this risk was reinsured by non-U.S. reinsurers.

Ms. Laws also cited RAA statistics that show that the U.S. reinsurance industry has experienced favorable results of late, with combined ratios experienced over the last five years of 94.2% (2006), 93.5% (2007), 100.4% (2008), 92.3% (2009) and 94.5% (2010). But catastrophe losses in early 2011 in the U.S., New Zealand and Europe have spawned combined ratios of 129.3% and 116.2% for the first and second quarters of 2011, respectively. Finally, with respect to the reinsurance marketplace, Ms. Laws reported that the P&C reinsurance market outlook is considered to be stable by the rating agencies with Fitch (stable), Standard & Poor's (stable, well capitalized) and A.M. Best (stable) all concurring that the industry has a stable outlook.

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Panelists Discuss Attorney-Client Privilege in Communications Between Cedents and Reinsurers

By Christine Phan,
Zelle Hofmann Voelbel & Mason LLP

A common issue that often arises in the context of reinsurance arbitration and litigation is the extent to which attorney-client privilege can and should be maintained in communications between cedents and reinsurers. At the Third Annual MReBA Symposium, arbitrator Tom Stillman of Tom Stillman Arbitrations, Reka Koerner of Swiss Re, and Patricia Taylor Fox of Chartis offered unique viewpoints of the different parties involved in reinsurance disputes - the arbitrator, the reinsurer, and the cedent - on the issue of attorney-client privilege and the work product doctrine. Jerry McElroy, a partner at Zelle Hofmann Voelbel & Mason LLP, moderated the panel.

The panel provided insight on the cedent-reinsurer relationship from both a legal and practical standpoint. Mr. McElroy provided a case law review of the contours of the attorney client privilege in communications between a cedent and reinsurer. Ms. Fox and Ms. Koerner offered their views based on their experience in the role of cedent and reinsurer, respectively. A common theme that both Ms. Fox and Ms. Koerner repeatedly emphasized was that both cedents and reinsurers approach reinsurance disputes bearing in mind that both parties would benefit from maintaining a good relationship. Because of this perspective, the parties often work together to resolve privilege issues, such as by utilizing a confidentiality order or by agreeing to allow production of documents after the underlying litigation has concluded. Mr. Stillman offered the viewpoint of a seasoned arbitrator. With his commentary, Mr. Stillman highlighted the fact that the "arbitration belongs to the parties" and that with agreement and good faith, the arbitration will proceed at the parties' direction. All parties were aware of the potential impact of disclosure on any underlying coverage litigation and agreed that reinsurance disputes concerning privilege should proceed with this impact in mind.

Case Law Review

Mr. McElroy began by outlining pertinent case law on the issue of attorney-client privilege in reinsurance communications. He summarized the general contours of attorney-client privilege and the work product doctrine. The attorney-client privilege protects communications made between privileged persons in confidence for the purpose of obtaining legal advice for the client. The work product doctrine protects items prepared by or for a party in anticipation of litigation from disclosure.

In some cases, Mr. McElroy noted, the dispute between the cedent and reinsurer has been over whether certain communications are privileged in the first instance. Mr. McElroy cited *AIU Ins. Co. v. TIG Ins. Co.*, No. 07-CV-7052, 2008 U.S. Dist. LEXIS 66370 (S.D.N.Y. Aug. 28, 2008), a case where the issue was whether the communication constituted business advice or privileged legal advice. The court in that case held that, where in-house counsel was offering business advice in his capacity as a vice president of the company, documents containing those communications were not privileged. Mr. McElroy pointed out that business advice that is not protected by the attorney client privilege may be subject to disclosure even after the commencement of litigation.

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Panel Explores Right to Associate, Claims Cooperation and Claims Control Clauses

By Rachel M. Davison,
Morrison Mahoney LLP

Panelists Michael A. Franz (Munich Re America), John T. Harding (Morrison Mahoney LLP), Susan Hartnett (Sugarman, Rogers, Barshak & Cohen, P.C.) and Joseph S. Sano (Prince Lobel Tye LLP) led an informative discussion about the right to associate, claims cooperation, and claims control clauses that appear in nearly every facultative reinsurance contract and many treaties, but are infrequently invoked and rarely the subject of litigation. While many in the audience confirmed that such rights are infrequently exercised, because these types of clauses can play a meaningful role in the handling of reinsurance claims, parties should not only familiarize themselves with the different wordings in the contracts and understand the key differences in these clauses, but should also consider the potential benefits and risks of including such clauses and exercising the rights they confer.

The rights, the obligations, and the degree of control conferred by these clauses are on a continuum, with the more typical "right to associate" at one end of the spectrum, and "control clauses" at the other. The specific wording employed in the reinsurance contract determines how involved the reinsurer may become in the handling of underlying claims.

"Association clauses" typically grant the reinsurer the right and opportunity to "associate in the handling and defense" of underlying claims. Although the contract language does not further define how this right should be exercised, in practice, this clause permits the reinsurer to consult with and advise the reinsured in its handling of the claim without imposing any affirmative obligation on the reinsurer to investigate or defend the underlying claim. While the level of association varies from relationship to relationship, the right generally includes more than the contractual right of inspection and claims review, and allows reinsurers the right to have and timely express an opinion about the on-going handling of the underlying claim. But, as one panelist observed, there might not be anyone listening.

"Claims cooperation clauses" typically grant the reinsurer an increased measure of control by granting it the right to cooperate with the insurer in the settlement of underlying claims, and not just the defense, often by prohibiting settlement without the consent of the reinsurer. As the panel explained, these clauses are more common in London-based reinsurance contracts.

Claims control clauses, on the other hand, tend to permit the reinsurer to participate directly in negotiations, adjustment and settlement of underlying claims. In general, these clauses are more common when the ceding company retains little or no risk. These clauses cede the most control to a reinsurer and may impose an affirmative obligation on the reinsurer to exercise actual control over all or a portion of the claims handling, including the obligation to investigate, adjust and resolve claims.

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Symposium Workshop Offers Practical Insights

By John Matosky,
Prince Lobel Tye LLP

Once again, the liveliest portion of this year's symposium was the workshop. During this interactive session, symposium attendees and MReBA members discussed and debated issues related to the morning's presentation on the attorney/client privilege in the context of a reinsurance claim. The exercise culminated in a mock argument about whether the cedent and reinsurer would need to respond to subpoenas issued in a class action filed against the original insured, requesting that they produce their respective claim files, including documents received from the insured and communications with coverage counsel.

Participants received a fictional fact pattern involving a pharmaceutical company that manufactured and sold a weight loss drug. Customers of the drug commenced a class action against the manufacturer to recover for injuries they allegedly suffered as a result of side effects, some of which were not warned against. The manufacturer tendered the lawsuit to its insurer seeking defense and indemnification. Eventually, the insurer notified its reinsurer. Of course, as is the nature with such exercises, the fact pattern included additional details that presented few obvious choices for each of the parties.

To assist in spotting issues and planning strategies, the participants were organized into groups, and MReBA members, Alex Henlin (Edwards Wildman Palmer LLP), Nick Cramb (Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.) and Rob Whitney (Massachusetts Division of Insurance) acted as counsel and group facilitators for the insured, cedent and reinsurer groups, respectively. Bill Erickson (Robins, Kaplan, Miller & Ciresi, L.L.P.) moderated the discussion and played the role of class action counsel.

At every stage of the exercise, each group was confronted with the tension between sharing helpful information and withholding harmful information while complying with contractual cooperation and access provisions in their agreements. Also in the mix, of course, was the need to preserve the attorney-client privilege.

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OFAC Reinsurance Compliance: Keynote Speaker David Brummond Delivers ''Tough Love''

By Melissa D'Alelio,
Robins, Kaplan, Miller & Ciresi, L.L.P.

Before our Lady Justice calm he stands
To have her grave, immutable commands; . . .
She holds the balance true, with steady hands
And strong, the little while wavereth.

--Edward Livermore Burlingame, Scribner's Magazine, p. 35 (1888)

The image of Lady Justice balancing the scales of truth and fairness is a familiar one. Upon those scales, Lady Justice measures the strength of a case's support and opposition. She is often seen carrying a double-edged sword in her right hand, symbolizing the power of reason, which may be wielded either for or against a party. David Brummond, Senior Sanctions Advisor at the Insurance Office of Foreign Assets Control ("OFAC") at the U.S. Treasury Department, candidly delivered a strong message during the MReBA's Annual Symposium on October 6, 2011, stating that his job is not one of balancing and measuring-it is one of "law enforcement." Drummond was clear: OFAC compliance is not a topic where violators will be invited to set forth

their case on the scales of justice or be invited to "work things out" with the U.S. government. As Brummond remarked: "It is strict liability." Fortunately he understands the insurance and reinsurance industry, having been General Counsel of the National Association of Insurance Commissioners ("NAIC"), and is willing to work with industry members to find solutions if they seek guidance *before* potentially violating OFAC regulations. - for example, by paying a claim under a reinsured marine insurance policy, where one of the recipients of the proceeds is an Iranian national.

OFAC administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy, or economy of the U.S.. OFAC acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under U.S. jurisdiction. Many of these sanctions are based on United Nations and other international mandates and involve cooperation with allied governments.

OFAC has a rich and interesting history. It is the successor of the Office of Foreign Funds Control ("FFC"), which was established following the German invasion of Norway in 1940, at the outset of World War II. OFAC itself was formally created in December 1950, following the entry of China into the Korean War, when President Truman declared a national emergency and blocked all Chinese and North Korean assets subject to U.S. jurisdiction.

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Members In Print

Member Jerry McElroy published an article titled "Navigating Through the Ethical Thicket in Reinsurance Arbitrations" in the First Quarter 2011 edition of ARIAS*U.S. Quarterly.

Do you have a recent publication that we can highlight to our membership? Please let a member of the newsletter committee know.

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